National Energy Board | Office national de l'énergie

Reasons for Decision

Trans Mountain Pipeline Inc.

RH-4-2008

October 2008

Tariff

Canada

National Energy Board

Reasons for Decision

In the Matter of

Trans Mountain Pipeline Inc.

Application dated 14 March 2008
pursuant to Part IV for approval of
PROPOSED Tariff No. 74

RH-4-2008

October 2008

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Abbreviations

AB	Alberta
Act	*National Energy Board Act*
Advanced Dock Nomination	2-day advance date for nominations to Westridge Dock with bid Premium
ADOE	Alberta Department of Energy
Application	application from TMI dated 14 March 2008 for the allocation of incremental pipeline capacity on Trans Mountain and modifications to the provisions in the Trans Mountain Rules and Regulations Tariff
Astra	Astra Energy Canada Inc.
barge	marine vessel capable of carrying crude oil cargos up to 12 720 m^3 (80,000 bbls)
BC	British Columbia
Board	National Energy Board
BP	BP Canada Energy Company
bbls, bpd	barrels, barrels per day
CAPP	Canadian Association of Petroleum Producers
CEA	Confidential Export Agreement
Chevron	Chevron Canada Limited and Chevron Canada Resources
ConocoPhillips	ConocoPhillips Canada Limited
Destination(s)	category, based on the delivery destination, for allocating a specified portion of the capacity for crude oil and product deliveries on Trans Mountain; categories include Export Destinations, Domestic Destinations and Westridge Dock
Dock or Westridge Dock	TMI's Westridge Marine Terminal in Burnaby, BC
Domestic Destinations	the capacity allocation category on Trans Mountain for deliveries to pipeline-connected facilities in Burnaby, BC other than TMI's Westridge Marine Terminal
Export Destinations	the capacity allocation category on Trans Mountain for deliveries to the four pipeline-connected Washington State refineries

KMCT	Kinder Morgan Canada Terminals
Land or Land Destinations	all Domestic and Export Destinations
m^3, m^3/d	cubic metres, cubic metres per day
MH-1-2006	Board proceeding regarding an application from TransCanada Keystone Pipeline GP Ltd. for leave to transfer certain pipeline facilities from TransCanada Pipelines Limited
Nexen	Nexen Marketing and Nexen Inc.
Panamax tanker	marine vessel with a crude oil cargo capacity of approximately 55 600 m^3 (350,000 bbls)
Premium	Westridge Dock Premium
Receipt Window	capacity created on Trans Mountain at Kamloops, BC due to petroleum deliveries offloaded at Kamloops
RH-1-2007	Board proceeding regarding an application from TransCanada Pipelines Limited for a receipt point at Gros Cacouna, Québec
Rules and Regulations Tariff	petroleum tariff setting out the rules and regulations governing the transportation of petroleum on Trans Mountain
SEMI	Suncor Energy Marketing Inc.
tanker	marine vessel capable of carrying crude oil cargos in excess of 12 720 m^3 (80,000 bbls)
Tariff 74	PROPOSED Tariff No. 74
Tariff 76	PROPOSED Tariff No. 76
Tesoro	Tesoro Canada Supply and Distribution Ltd.
TMI	Trans Mountain Pipeline Inc.
TMX Phase I	Phase 1 of the TMX Anchor Loop Expansion Project, which came on stream in April 2008
TMX Phase 2	Phase 2 of the TMX Anchor Loop Expansion Project, expected to come on stream in November 2008
Trans Mountain	TMI's Trans Mountain pipeline system

Recital and Appearances

IN THE MATTER OF the *National Energy Board Act* and the Regulations made thereunder; and

IN THE MATTER OF an application dated 14 March 2008 by Trans Mountain Pipeline Inc. for approval of PROPOSED Tariff No. 74, Rules and Regulations Governing the Transportation of Petroleum, to be effective 1 May 2008, the in-service date for Phase 1 of the TMX Anchor Loop Expansion Project, filed with the National Energy Board under File No. OF-Tolls-Group1-T246-2008-02 01; and

AND IN THE MATTER OF Hearing Order RH-4-2008;

HEARD in Calgary, Alberta on 4 September 2008;

BEFORE:

Mr. R.R. George	Presiding Member
Mr. K.M. Bateman	Member
Ms. G.A. Habib	Member

Appearances	**Participants**
Mr. D.A. Holgate	Trans Mountain Pipeline Inc.
Mr. N.J. Schultz	Canadian Association of Petroleum Producers
Mr. D. Davies	Astra Energy Inc.
Mr. J.D. Brett	BP Canada Energy Company
Mr. C. Sanderson	Chevron Canada Limited and Chevron Canada Resources Ltd.
Ms. A. Avery	ConocoPhillips Canada Limited
Mr. E. Reinhart	Glencore Ltd.
Mr. R.J. Lane	Imperial Oil Limited
Mr. J. Pendrel	Nexen Marketing
Mr. R. Wilson	Petro Canada
Mr. G. Nettleton	Shell Canada Energy and Shell Trading Canada, a division of Pennzoil-Quaker State Canada
Mr. M.S. Forster	Tesoro Canada Supply & Distribution
Mr. C. King	Alberta Department of Energy
Ms. J. Saunders	National Energy Board

Chapter 1

Introduction

1.1 Application

On 14 March 2008, Kinder Morgan Canada Inc. filed an application (Application) with the Board, on behalf of its wholly-owned subsidiary, Trans Mountain Pipeline Inc. (TMI), requesting, pursuant to Part 4 of the *National Energy Board Act* (Act), an Order or Orders approving the allocation of incremental pipeline capacity from Phase 1 of the TMX Anchor Loop Expansion Project (TMX Phase 1) on the Trans Mountain pipeline system (Trans Mountain), and modifications to the provisions in the Trans Mountain Tariff allocating capacity during times of apportionment on Trans Mountain. Figure 1 is a map showing the Trans Mountain system. The allocation and Tariff modifications requested by TMI included:

a) allocating to the Dock Destination capacity, an incremental volume of 2 200 m^3/d (13,820 bpd) (equivalent to 1 Panamax tanker cargo plus 1 barge cargo);

b) adding Rule 6.8 to limit the number crude types that can be accepted for loading onto all tankers to two when four or more tankers are nominated;

c) modifying the capacity allocation to the Domestic and Export Destinations such that all Land capacity, including the TMX Phase 1 capacity not allocated to the Dock, is allocated 52 percent to Domestic and 48 percent to Export, rather than the then current 54/46 percent split between Domestic and Export Destinations;

d) removing reference to the Confidential Export Agreement (CEA)[1] and the concept of "Incremental Export Capacity" from the Tariff; and

e) minor wording changes for consistency within the Tariff.

These changes were included in PROPOSED Tariff No. 74 (Tariff 74), the proposed new petroleum tariff setting out the rules and regulations governing the transportation of petroleum on Trans Mountain (Rules and Regulations Tariff). Tariff 74 was submitted with the Application. TMI requested that Tariff 74 be made effective 1 May 2008, the in-service date of TMX Phase 1, and remain in place until the start-up of the second phase of the Anchor Loop expansion (TMX Phase 2) in November 2008. TMI stated that, prior to the start-up of TMX Phase 2, it would be filing a new Rules and Regulations Tariff which would include a more open nomination process for obtaining capacity on its pipeline system. It further stated that some of the proposed changes to the capacity allocation procedure in Tariff 74 were aimed at easing the transition to the more open process that it intended to put in place when TMX Phase 2 comes on stream.

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1 The CEA refers to a confidential agreement between the four Washington State refineries (BP Cherry Point Refinery, ConocoPhillips Ferndale Refinery, Tesoro Petroleum Anacortes Refinery, and Shell Oil Anacortes Refinery) that are connected by pipeline to Trans Mountain, to allocate capacity within the Export Destinations category during times of apportionment on Trans Mountain. The use of the CEA was first approved by the Board on 15 March 2006 in Interim Petroleum Tariff No. 61 and Interim Refined Petroleum Tariff No. RP 29.

Figure 1
Trans Mountain Pipeline System

1.2 Process

Board Process

TMI noted that the proposed changes in Tariff 74 did not have unanimous support of its shippers. In addition, by letter to the Board dated 2 April 2008, Chevron Canada Limited and Chevron Canada Resources (collectively Chevron) voiced opposition to the proposed changes to the allocation procedures. Chevron requested the Board dismiss the Application and direct TMI to address the disposition of both the expected spring and fall 2008 capacity at the same time. By letter dated 3 April 2008, the Board established a process to obtain comments on the Application and the process for its consideration. In the same letter, the Board, having taken into account timing considerations around the nomination requirements for deliveries on Trans Mountain and the need to allocate the TMX Phase 1 capacity in a timely manner, approved those provisions[2] amending the allocations to the three delivery destinations on a temporary basis until it issues its decision on the Tariff 74 application as a whole. On 4 April 2008, TMI filed Interim Tariff No. 74 REV, which contained these revised allocations.

Comments were submitted by Astra Energy Canada Inc. (Astra), BP Canada Energy Company (BP), the Canadian Association of Petroleum Producers (CAPP), ConocoPhillips Canada Limited (ConocoPhillips), Nexen Marketing and Nexen Inc. (collectively Nexen), Petro-Canada, Suncor Energy Marketing Inc. (SEMI) and Tesoro Canada Supply and Distribution Ltd. (Tesoro).

After considering the comments received, the Board decided to convene a public hearing with oral final argument. Accordingly, on 26 May 2008, the Board issued Ruling 1 and Hearing Order RH-4-2008 in respect of the Application. In Ruling 1, the Board determined that the TMX Phase 1 and TMX Phase 2 capacity allocation procedures should be considered in the same proceeding, and included both phases in the RH-4-2008 List of Issues. TMI was to file its submissions with respect to the TMX Phase 2 capacity allocation procedures at the time it filed its additional written evidence. The full text of the Ruling 1 letter is attached as Appendix 1.

List of Issues

On 4 June 2008, TMI submitted a letter to the Board indicating that, in its additional evidence, it intended to discuss two additional issues: capacity allocation with respect to receipts and deliveries at Kamloops, BC; and amendments to the Rules and Regulations Tariff to provide clarity with respect to the definition of Land versus Dock deliveries for potential new tanks at Burnaby, BC. TMI considered that the RH-4-2008 List of Issues was general enough to encompass these issues. In Ruling 2, issued 5 June 2008, the Board added these issues to the List of Issues.

By letter dated 4 June 2008, Astra requested that the disposition of Westridge Dock Premium (Premium) for 2008 and beyond be included as an issue in RH-4-2008. In Ruling 2, the Board denied Astra's request noting the Premium already fell within the scope of a separate toll proceeding before the Board.

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2 Noted at subparagraphs a) and c) on the previous page.

The complete text of Ruling 2, including the Revised List of Issues, is attached as Appendix 2.

Additional Evidence

On 11 June 2008, TMI filed its additional written evidence in which it discussed capacity allocation issues related to both TMX phases and the new issues on the revised List of Issues. TMI also submitted a revised Rules and Regulations Tariff, PROPOSED Tariff No. 76 (Tariff 76)[3] which included modifications related to these issues.

3 Tariff 76 was filed on 11 June 2008 with TMI's additional evidence and subsequently re-filed with minor administrative changes on 19 June 2008. These changes removed language pertaining to Export Destinations that had not been removed previously due to administrative error.

Chapter 2

Capacity Allocation for Kamloops Receipts and Deliveries

Views of TMI

TMI proposed a methodology to apportion nominations at Kamloops to Trans Mountain. This methodology was set out in Rule 15 of Tariff 76. Historically, deliveries to Kamloops (creating a Receipt Window) had been greater than nominations to the pipeline at Kamloops, making an apportionment methodology for Kamloops nominations unnecessary. Recently however, nominations at Kamloops had been close to, or exceeded, the Receipt Window. TMI stated the apportionment methodology for Kamloops nominations would apply if the pipeline from Edmonton, AB to Burnaby is apportioned and the nominations at Kamloops exceed the Receipt Window. In this situation, TMI proposed that each shipper nominating at Kamloops would receive a *pro rata* share of capacity up to the Receipt Window and that volumes in excess of the Receipt Window would be included in Edmonton volumes and allocated on the same basis as Edmonton nominations.

In response to CAPP's concern regarding potential suboptimal use of capacity from Edmonton to Kamloops, TMI submitted that CAPP's proposed methodology, unlike TMI's proposal, would provide shippers nominating for capacity from Edmonton to Kamloops priority over shippers nominating for capacity from Edmonton to points beyond Kamloops. TMI argued that its proposal would not strand capacity upstream of Kamloops. Furthermore, as a common carrier, TMI is incented to maximize use of capacity in accordance with its incentive toll settlement.

Views of Parties

CAPP supported the intent of TMI's methodology for Kamloops. However, it had concerns around the lack of clarity as to how apportionment would be calculated and the potential for less than optimal use of capacity upstream of Kamloops. CAPP suggested deliveries from Edmonton to Kamloops could be maximized without impacting deliveries to Burnaby. This would result in increased utilization of the pipeline system. In CAPP's view, TMI's proposed methodology was acceptable as long as it was assured TMI would optimize use of pipeline space. It recommended TMI consult with shippers to determine the exact methodology.

No other party expressed a different position than that put forward by CAPP or by TMI.

Views of the Board

The Board is of the view that TMI's proposed methodology, as subsequently clarified, is just and reasonable, with no unjust discrimination. The methodology provides a reasonable solution during times of apportionment for dealing with any excess volumes nominated at

Kamloops above the available Receipt Window. Accordingly, the Board approves the Kamloops Capacity allocation methodology.

The Board encourages TMI to continue communicating with CAPP and its shippers should further concerns arise about ambiguity surrounding the implementation of this methodology. The Board notes TMI's commitment to ensure pipeline capacity utilization is optimized through its apportionment methodology. In the Board's view, optimizing capacity use between Edmonton and Kamloops without negatively impacting the Edmonton to Burnaby shippers is not unjustly discriminatory.

Chapter 3

Allocation Category for New Burnaby Tanks

Views of TMI

In TMI's 4 June 2008 letter to the Board, TMI requested that an additional issue be added to this proceeding. It indicated that Kinder Morgan Canada Terminals (KMCT) had requested TMI to clarify whether a shipper delivering to a tank at Burnaby, for delivery in a subsequent month to either the Dock or a Land Destination, would be allocated pipeline capacity within the Land Destinations category or the Dock Destination category. KMCT had indicated this information was essential in engaging in discussions with its potential shipper customers about new tanks that were proposed to be built at Burnaby, some of which would be made available to KMCT and their customers for contract tankage.

TMI submitted that any new tanks to be built at Burnaby should be designated as a Land Destination, because:

- deliveries to the tanks, which would be on land in Burnaby, would be metered out of the Trans Mountain system;
- should the volumes go to the Dock in a subsequent month, a new receipt nomination would not impact mainline apportionment since the Dock is not constrained and is capable of loading 10 to 15 vessels per month;
- should the volumes go to another Land destination in a subsequent month, a new receipt nomination would not impact mainline apportionment;
- the bid Premium process is not intended to allocate the Dock's physical capacity which is not constrained; and
- the new tanks would be treated the same as other land based delivery locations, refineries and other marketing terminals located adjacent to the Burnaby Terminal.

Accordingly, customers using these tanks would compete for capacity with other Land Destinations and would be apportioned on a *pro rata* basis should there be system apportionment. Volumes nominated to the tanks would not be permitted to use the Advanced Dock Nomination process nor would they be subject to the Premium.

Views of Parties

Many parties objected to the proposed characterization of the tanks as a Land Destination for capacity allocation purposes. The objections raised a number of concerns:

- pre-maturity of the request and lack of sufficient evidence before the Board concerning the physical aspects of these facilities;
- late introduction of this issue without adequate consultation with shippers;

- whether TMI was inappropriately seeking an advance ruling to aid an affiliate;
- the appropriateness of designating the tanks as a Land Destination with no regard to the ultimate destination of the oil;
- impact on the availability of pipeline capacity to Land shippers; and
- whether the proposal offers preferential treatment to Dock shippers.

Astra supported TMI's application, arguing that it was appropriate for the contract tanks to be considered a Land Destination. Astra argued that the Board's decisions in Gros Cacouna (RH-1-2007) and TransCanada Keystone (MH-1-2006) were precedents for the Board making staged rulings; for example, making a toll or section 74 decision in the absence of a facilities application. Nexen also supported TMI's Application, arguing that it provides overall operational flexibility to the pipeline system.

Views of the Board

The Board notes that the evidence regarding contract tankage and its designation was not filed until a later stage of the proceeding. As a result, a number of parties in this proceeding, and others who may not have been aware of the late inclusion of this issue, did not have an opportunity to fully explore and formulate a position on this issue. For example, the addition of this issue resulted in BP changing its position from one of support to one of opposition to TMI's Application.

Many of the parties argued that there was insufficient evidence before the Board or consultation with shippers with respect to this proposal. Based on the comments and evidence received, the Board is of the view that it was not clear the extent to which TMI afforded its shippers and potential parties outside of this application the opportunity to understand the project and assess its implications prior to coming to the Board. This is a distinguishing factor between the precedents Astra raised and the current circumstances before the Board.

As a result, the Board denies TMI's request, without prejudice to TMI's ability to come back to the Board with another application following broader consultation with all interested parties. The Board expects that TMI would then be able to show that it had consulted to a sufficient degree with its shippers and interested parties and had identified and possibly, addressed concerns and issues raised by those parties with respect to the proposal. In the Board's view this approach facilitates a more efficient and effective regulatory process, which is in the best interest of all parties involved.

Given the views and the Board's decision, it is not appropriate for the Board to comment on the merits of the request itself or the other concerns raised.

Chapter 4

Westridge Dock

4.1 Allocation

Views of TMI

Under the Rules and Regulations Tariff, a fixed capacity is allocated to the Dock and the balance is allocated to Land Destinations. TMI submitted that a fixed allocation for Dock nominations recognizes the unique characteristics of Dock deliveries (not rateable, must be vessel-sized and must be coordinated with marine transportation). Further, due to these unique characteristics, allocations to the Dock are made in tanker-size or barge-size increments.

TMI proposed allocating the 6 360 m^3/d (40,000 bpd) of incremental capacity from the Anchor Loop expansion (both TMX Phase 1 and TMX Phase 2) in the following way:

- 35 percent or 2 200m^3/d (13,820 bpd) to the Dock (one additional tanker, bringing the total tankers to 4, and one addition barge, bringing the total barges to 2); and
- 65 percent or 4 160m^3/d (26,180 bpd) to the Land Destinations.

TMI noted that with this allocation split, the Dock would see a 33 percent increase, and Land Destinations a 12 percent increase, in capacity over the capacity allocation prior to the Anchor Loop Expansion. It submitted that the proposed capacity addition to the two categories was based on historic and present usage of the system.

Views of Parties

Most parties providing evidence and comments agreed with this allocation. Astra stated it would prefer an auction on the whole system, including both Land and Dock, in order to allocate capacity; however, it did not oppose TMI's proposal.

BP initially agreed with the allocation until TMI added the contract tank proposal to its application. At that [illegible] withdrew its support for TMI's entire application. However, BP indicated in argument that should the contract tank proposal disappear, BP would support TMI's application.

4.2 Rule 6.8

Views of TMI

TMI proposed adding Rule 6.8 to its Tariff. Rule 6.8, states:

> Due to tankage restrictions, Carrier [TMI] reserves the right to limit crude types accepted in each Month for shipment across Westridge Marine Terminal, by the

following procedure. If four or more tanker bids are Nominated in the Advanced Dock Nomination, crude types accepted will be limited to two crude types.

Determination of the crude types to be transported will be based on the highest priority bids in accordance with Rule 14.3. Successive bidders may be required to ship the same crude type as one of the two determined by the highest priority bids.

Should the proposed allocation of incremental capacity from the Anchor Loop expansion be approved by the Board, TMI would be able to accommodate four tanker shipments in a month. In order to accommodate four different crude types, TMI submitted that it may have to slow the line, reducing throughput and affecting Land shippers, or risk contamination of Dock shippers' product. To manage these concerns, TMI proposed limiting the number of crude types to be accepted for delivery to the Dock to two if four or more tankers are nominated. The top two bids in the Westridge Dock bid premium process would be used to determine the types of crude to be accepted. TMI stated that additional tankage scheduled to be in service in Edmonton in 2010 will enable Trans Mountain to accommodate four different crude types; however, TMI proposed retaining Rule 6.8 for operational flexibility.

TMI noted that its Rules and Regulations Tariff already contains rule 6.6 which addresses issues of contamination. However, TMI argued that this rule was not preferred, as it has implications for Dock shippers' ability to access feeder pipelines. TMI also indicated that a proposed change of wording by CAPP was acceptable, as it provided TMI with the discretion to apply this rule to maintain and optimize operational flexibility. TMI clarified in argument that Rule 6.8 would not be applied if operational circumstances permit more than two tanker-destined commodity types to be accommodated without adversely impacting throughput or causing contamination.

Views of Parties

CAPP and others raised a concern regarding the implementation of this Rule and the exercise of TMI's discretion with respect to its implementation. CAPP proposed a change in the wording of Rule 6.8, as follows:

> Due to tankage restrictions, Carrier reserves the right to limit crude types accepted in each Month for shipment across Westridge Marine Terminal, by the following procedure. If four or more tanker bids are Nominated in the Advanced Dock Nominations, the crude types accepted ~~will~~ **MAY** be limited to two crude types. [Emphasis added]

Nexen's initial position was that limiting to two crude types is unfairly discriminatory against smaller shippers and would effectively limit market growth. However, after hearing the comments of other parties, including the acceptance by TMI of the wording change proposed by CAPP, Nexen supported the inclusion of Rule 6.8, as revised.

Other parties stated that the change proposed by CAPP was acceptable and they did not oppose the addition of Rule 6.8, as amended.

Views of the Board

As stated in previous decisions, the Board recognizes that nominations for the Dock cannot be apportioned in the same way as nominations on the rest of the system given the characteristics of marine deliveries, which are non-rateable, must be vessel-size and must be coordinated with marine transportation. In the Board's view, this warrants treating Westridge Dock nominations differently from nominations on the rest of the system.

The Board finds TMI's proposed allocation of expansion capacity is just and reasonable and not unjustly discriminatory. It represents an equitable way to split the expansion capacity between the two destination categories, given the characteristics of Dock deliveries and the current circumstances on the Trans Mountain system. The Board therefore approves the allocation to the Dock of capacity equivalent to one additional tanker and one additional barge. The Board notes that TMI has general support for this capacity allocation.

The Board recognizes the importance of avoiding contamination of one crude type by another and the necessity of batching to achieve this goal. The Board also acknowledges TMI's desire to make effective use of the pipeline capacity while not unduly affecting one category of shipper (in this case, Land) due to operational constraints of another category (in this case, Dock).

The Board finds that Rule 6.8, as modified, is just and reasonable and not unjustly discriminatory, as it promotes operational efficiency and mitigates adverse impacts that the allocation of additional capacity to the Dock may create. The Board approves the addition of Rule 6.8 into the Tariff with the change from "will" to "may" as proposed by CAPP. TMI is expected to discuss whether this Rule continues to be necessary with CAPP and TMI's shippers again, once additional tankage is available in Edmonton.

Chapter 5

Land Destinations

Views of TMI

TMI noted that the Board had previously expressed the expectation that TMI would move to "a more open access process" for apportionment. In TMI's view, the goal of a "more open access process" suggests that, to the extent possible, shippers should be treated as consistently and equitably as possible regardless of volume destination. It argued that *pro rata* apportionment, based on nominations, treats all shippers alike and fairly without deference to shipper characteristics. TMI submitted that Tariff 76 would introduce a more open access process for capacity allocation to Land Destinations by eliminating the CEA and combining the Export and Domestic Destinations categories into a single Land Destinations category that would be apportioned *pro rata* in times of apportionment[4]. It requested that Tariff 76 be made effective in conjunction with the start-up date of TMX Phase2.

TMI noted that the Board first approved the use of the CEA to allocate Export capacity during times of apportionment in a decision dated 15 March 2006. The CEA was a unique and reasonable response to a particular set of circumstances, including chronic apportionment and the need to expand the system. It submitted that these circumstances no longer exist. In support of this view, TMI noted that by the end of 2008, a total of 11 900 m^3/d (75,000 bpd) of space will have been added to Trans Mountain, equivalent to a one-third increase in capacity on the pipeline system. Further, with the exception of January, Export and Domestic nominations were not constrained in 2008. In TMI's view, this indicates sufficient capacity was available in those months. TMI also indicated that new ex-Alberta pipeline capacity is expected to grow by 240 000 m^3/d (1.5 million bpd) by the end of 2012, while at the same time there is significant risk that the growth in Western Canadian oil production will be lower than forecast. TMI stated that this would likely result in Trans Mountain throughput being less than capacity over the foreseeable future, thus questioning the need for the current unique apportionment policies.

TMI raised additional concerns about market impacts of the CEA and the existence of separate categories for Export and Domestic deliveries. In its view, the current methodology tilts the market in favour of refiners, who have secure capacity compared to producers, by reducing competition among refiners and therefore, potentially reducing prices to producers. It maintained that elimination of CEA and creation of a single Land Destinations category would better balance the market between refiners and producers by creating more competition between Domestic and Export Destinations. Eliminating the CEA would also help address the situation where Export shippers are assured a fixed proportion of the capacity allocated to the Export Destinations category, whereas individual Dock shippers and Domestic shippers are not assured of capacity.

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4 In its Application, TMI initially proposed doing this in two stages, co-incident with the in-service dates for TMX Phase 1 and TMX Phase 2 respectively. It combined its proposal in its additional evidence and Tariff 76 after the Board ruled that capacity allocation for both Anchor Loop Phases would be considered concurrently in this proceeding.

TMI also agreed with Astra's position that the advantages some shippers enjoy under the current procedures mask the signals that would otherwise focus attention on the need to expand the system. With regard to the argument that *pro rata* apportionment could result once again in overnominations[5], TMI argued that the most significant step in controlling these types of abuses in the past was the initial separation of Dock and Land. TMI's proposed Rules and Regulations Tariff, filed as evidence, also contains a non-performance penalty at Rule 7.4.

Views of Parties

Parties in Support

Astra was the only party to submit evidence supporting the removal of the CEA and a single Land Destinations category to be apportioned *pro rata*. In Astra's view, the existing allocation methodology disadvantages the Dock shipper, reduces competition for supply, and does not facilitate the operation of market forces.

Astra submitted that Dock shippers are prejudiced because the Dock is allocated only 17 percent of Trans Mountain capacity and therefore may not be able to influence matters on Trans Mountain including system expansion. Under the current allocation scheme the pipeline-connected refineries within the Land Destinations category have no motivation to support an expansion. Astra submitted that the capacity allocation rules should provide an incentive to all shippers to consider facility additions as the answer to apportionment.

Astra also argued that the CEA is anti-competitive because it restrains Washington State refiners from competing against each other for crude oil supply. This could ultimately result in reduced prices for the crude oil producers. Accordingly, this is another reason it should be eliminated from the Rules and Regulations Tariff.

With regard to merging the Export and Domestic categories into a single Land Destinations category, Astra noted that the Board recognized in previous decisions the need for a separate Dock category to be apportioned on an "all or nothing" basis. It argued however, that there is no need for separate Domestic and Export categories and good reason for merging them into a single category. Astra supported TMI's position and similar to its argument for removing the CEA, Astra argued that an effect of lack of competition between Domestic and Export shippers could be reduced prices to crude oil producers.

In response to concerns raised about a return to overnominations, Astra argued that these concerns could be resolved by introducing a premium bid mechanism for Land shippers, similar to that used to allocate Dock shipments.

SEMI and Nexen also fully supported the proposed changes to the Land Destinations allocation and apportionment rules. As indicated earlier, BP initially supported the Application as filed, including the elimination of the CEA and the collapsing of the Land Destinations into a single category, but later withdrew its support when the Burnaby tankage proposal was included in the

5 Overnomination refers to submitting a nomination artificially high above the amount a shipper has available to ship based on the expected level of apportionment in the following month in an effort to ensure the shipper receives the amount of capacity required for the actual available volume after apportionment has been calculated. Overnomination, also referred to as "air barrel" nomination, is considered to be a form of "gaming".

Application. However, it indicated in argument that should the contract tank proposal disappear, it would support TMI's Application.

Parties Opposed

Most parties opposed the proposed changes on the basis that the current system is the product of extensive industry consultation, negotiation and compromise which continues to be endorsed, or is not opposed, by the majority of Trans Mountain shippers. They argued further that there had been no significant capacity additions on Trans Mountain to warrant changing the methodology.

It was also the position of some parties that returning to open nomination and *pro rata* apportionment could result in a return to uncontrolled apportionment on nominations to Land Destinations and a return to the problems associated with overnomination that the current methodology had resolved. They submitted that the current methodology has limited apportionment and made apportionment predictable and much more manageable by shippers.

Tesoro added that prior to the introduction of the two Land Destinations and the use of the CEA, the uncertainties of supply and the resulting high nominations and apportionment made the optimization of Canadian crude to the Washington refineries problematic. It noted that Washington refineries have the ability to run foreign cargo-delivered crudes. Because the CEA increases supply security on Trans Mountain, it is largely responsible for minimizing apportionment on Trans Mountain and for the growth in Canadian crude oil sales to Washington refiners. In Tesoro's view, termination of the CEA could lead to a reduction in security of supply, which would almost certainly result in the Washington refineries looking elsewhere for more secure supply. This would likely lead to a decrease in both export volumes on Trans Mountain and optimization of the use of Canadian crude supply.

Views of the Board

The Board is aware that sustained and chronic apportionment has in the past lead to overnominations and resulted in operational inefficiencies on Trans Mountain and market disruptions. In fact, it was under such circumstances that the CEA was approved by the Board. Some parties expressed concerns that the removal of the CEA, combined with the collapsing of the Domestic and Export categories into a single Land Destinations category and reverting to a strictly *pro rata* apportionment methodology will increase the risk of a return to overnominations to Land Destinations. The Board notes that circumstances now are markedly different from what prevailed then. For instance:

- Land shippers no longer compete with Dock shippers for capacity;
- as of November 2008, Trans Mountain capacity will have increased by one third;
- apportionment to the Land Destinations has decreased substantially (there has been no apportionment on

nominations for delivery to Land Destinations since January 2008); and

- additional oil pipeline capacity ex-Edmonton has been approved by the Board and is, or is in the process of being, constructed.

In addition, industry has implemented extra safeguards to discourage overnomination. For example, TMI's current (and proposed) Rules and Regulations Tariff now contains, in Rule 7.4, a monetary penalty to discourage shippers from overnominating. This penalty was not in place when problems associated with apportionment first arose. Further, the Board takes note that industry has implemented other measures outside the purview of the Board to address overnomination concerns on trunk pipelines, such as the verification process by the Crude Oil Logistics Committee.

Based on the above, the Board is not convinced that problems associated with chronic overnominations will recur within the Land Destinations category if the Export and Domestic categories are merged and the CEA eliminated. The proposal is just and reasonable and not unduly discriminatory, given the circumstances that currently exist. In addition, TMI's proposal supports the goal of a more freely-operating and competitive market. Accordingly, the Board approves TMI's proposal as set out in Tariff 76. These changes are to be made effective in conjunction with nomination dates in the month prior to the start-up of TMX Phase 2.

The Board notes that TMI meets with its shippers and interested parties on a regular basis and encourages ongoing consultations. To promote informed consultations between TMI and it shippers about capacity allocation issues on the system and market signals arising therefrom, the Board directs TMI to provide a report on allocations, nominations, apportionment and any potential abuse of nominations for both the Dock and Land Destinations to its shippers and interested parties to this Application. The report should also be filed with the Board for information. The report shall cover the period from the effective date of the Tariff to 12 months after the implementation of the TMX Phase 2 capacity, and shall be submitted to the parties and to the Board within 90 days following the one-year anniversary of the TMX Phase 2 in-service date.

Finally, should there be unintended impacts resulting from this proposal that are not able to be dealt with by the parties, the Board notes that parties are able to bring any concerns forward to the Board for resolution.

Chapter 6

Tariff Review Schedule

Views of TMI

TMI stated that a mandated regular review of capacity allocation was not necessary. Any party who feels a review is warranted can raise the issue in a shippers' meeting; request that TMI convene a shippers' meeting; or raise the matter with the Board. Further, since capacity allocation issues do not arise in accordance with a pre-determined schedule, it is unlikely that the need for a review and the timing of a review would coincide.

Views of Parties

Most of the parties did not see a need for a regular review to be established, and supported the continuation of regular meetings among TMI and its shippers, during which the issue of capacity allocation could be reviewed on receipt of a customer complaint. CAPP also suggested that TMI provide shippers with information regarding the complaint process to be followed. Many also supported the provision by TMI to shippers of an annual report on capacity, in order to allow shippers to assess whether the allocation process is working.

During final argument, the Alberta Department of Energy (ADOE) requested that the Board direct TMI to formally establish a stakeholder consultation group, including stakeholders who are not shippers, to identify, discuss, resolve and report on pipeline-related issues. The Board could then charge the stakeholder consultation group with specific tasks, guidelines and timelines to discuss and resolve Board-originated requests. Individual parties could also sponsor issues for the stakeholder group to fully discuss.

TMI indicated in reply that there wasn't sufficient information about ADOE's proposal for the Board to make a decision, and given TMI's regular shippers' meetings, no further direction was required.

Views of the Board

The Board notes that TMI conducts shippers' meetings when there are issues to discuss. In addition, issues of concern can be raised to the Board's attention should adequate resolution not be achieved at the shippers' meetings. Consequently, the Board does not find it necessary at this time to mandate regular review of capacity allocations.

With respect to the ADOE's request, the Board is of the view that parties may determine whether it would be beneficial to increase the scope of current consultations without the need for Board involvement.

Given the history with respect to apportionment issues on Trans Mountain, and the interest raised by these issues, the Board is of the view that the provision of such information would be beneficial to shippers and to the Board. As previously noted in Chapter 5, the Board expects a report on these matters to be prepared and sent to the shippers, and filed for information with the Board.

The Board supports CAPP's suggestion that TMI provide its shippers with information on its complaint process on an annual basis.

Chapter 7

Compliance with the Act

Views of TMI

TMI expressed the view that the current situation and proposal with respect to the Dock allocation had not changed from that previously approved by the Board in its 12 April 2006 decision.

TMI indicated that removing both the split between Export and Domestic capacity and reliance on the CEA is moving towards treating similarly situated customers in a more consistent manner. In the context of compliance with the Act, it is superior to what was previously approved.

Views of Parties

Many of the parties submitted that the Board's previous decisions had addressed whether the current tariff complied with the Act. Some argued that circumstances have not changed and TMI had not provided any additional evidence to require the Board to revisit this issue. It was also argued that treating Domestic and Export Destinations shippers, which the Board had previously found not to be similarly-situated, as if they were now similarly-situated would depart from the objectives of the Act.

Some argued that using some of the expansion capacity to increase the allocation to the Dock, while still maintaining the current categories, was just and reasonable.

Views of the Board

The Board has discussed in detail the distinction between Dock and Land categories and the provisions of the Act in its previous decisions. One of the key factors underlying the previous decisions was the characteristics of marine deliveries, that is, that they are non-rateable, must be vessel-size and must be coordinated with marine transportation. These characteristics have not changed with the proposed allocation of new capacity indicated in the Application.

Since new capacity must be allocated in some manner, as previously discussed in Chapter 4, the Board finds the allocation to the Dock proposed by TMI to be consistent with the Act, in that it provides a reasonable compromise in the allocation of additional expansion capacity given the characteristics of marine deliveries and the capacity constraint issues on Trans Mountain.

As discussed in greater detail in Chapter 5, the Board is of the view that eliminating the CEA from the Rules and Regulations Tariff and combining

the Export and Domestic categories to be consistent with the Act. The factual underpinning has evolved from that which was in place when the Board made its prior decisions. In addition, TMI's proposal supports the goal of a more freely-operating and competitive market.

The Kamloops allocation and Rule 6.8 are also consistent with the Act, as discussed in Chapters 2 and 4.

Given the Board decision with respect to the Burnaby contract tank proposal set out in Chapter 3, at this time it is not necessary to discuss whether this proposal complies with the Act.

Chapter 8

Disposition

The foregoing chapters comprise the Board's Reasons for Decision in the RH-4-2008 proceeding.

To summarize, the Board approves:

- the Kamloops capacity allocation methodology as clarified;
- Rule 6.8 as amended;
- the allocation of 2 200 m^3/d of additional capacity to the Dock;
- the removal of the CEA for allocating Export capacity; and
- the merging of the Domestic and Export Destination categories into a single Land Destinations category to be apportioned on a *pro-rata* basis.

The Board dismisses TMI's application for clarification with respect to the Burnaby contract tankage proposal on a without prejudice basis.

The Board denies the requests for the establishment of a regular review of capacity allocations and a stakeholder consultation group.

TMI is directed to file a revised Rules and Regulations Tariff in accordance with this decision forthwith.

R.R. George
Presiding Member

K.M. Bateman
Member

G.A. Habib
Member

Calgary, Alberta
October 2008

Appendix I

Ruling 1

File OF-Tolls-Group1-T246-2008-02 01
26 May 2008

Ms. Brenda M. McClellan
Director, Regulatory Affairs and Forecasts
Kinder Morgan Canada Inc.
Suite 2700, 300 – 5th Avenue SW
Calgary AB T2P 5J2

Facsimile 403-514-6622

Dear Ms. McClellan:

Trans Mountain Pipeline Inc. (TMI)
PROPOSED Tariff No. 74
Hearing Order RH-4-2008

Application

On 14 March 2008, TMI filed with the National Energy Board, an application for approval of PROPOSED Tariff No. 74, Rules and Regulations Governing the Transportation of Petroleum, (Tariff 74) to be effective 1 May 2008 (Application), the in-service date for Phase 1 of the TMX - Anchor Loop Expansion project (TMX Phase 1). At its start-up, TMX Phase 1 was to add 3,980 m3/d (25,000 bpd) of incremental pipeline capacity to the Trans Mountain pipeline system. The rules and regulations tariff includes procedures for allocating capacity on the Trans Mountain pipeline system. According to these procedures, capacity is allocated based on delivery destination.

TMI requested that Tariff 74 be put in place until the start-up of TMX Phase 2 of the Anchor Loop Expansion. TMX Phase 2 is expected to add an additional 2 380 m3/d (15,000 bpd) of capacity on the pipeline system in November 2008 when it is scheduled to come on stream. TMI stated that it would be filing a new rules and regulations tariff prior to the start-up of TMX Phase 2 that would have a more open nomination process for obtaining capacity on its pipeline system. It indicated that some of the proposed changes to the capacity allocation procedure in Tariff 74 were aimed at easing the transition to the more open process that it intends to put in place when TMX Phase 2 comes on stream.

Preliminary comment process

By letter dated 3 April 2008, the Board noted that the formula proposed by TMI for allocating the incremental TMX Phase 1 capacity as well as other proposed changes in Tariff 74 did not have the unanimous support of TMI's shippers, and established a written process seeking comments on:

1. the issues to be considered by the Board relevant to the Application; and
2. the appropriate process for considering the Application and the rationale for that process.

Comments were received from Astra Energy Canada Inc. (Astra), BP Canada Energy Company (BP), Suncor Energy Marketing Inc. (SEMI), ConocoPhillips Canada (ConocoPhillips), the Canadian Association of Petroleum Producers (CAPP), Tesoro Canada Supply and Distribution (Tesoro), Nexen Marketing (Nexen) and Petro-Canada. Comments were submitted previously by Chevron Canada Limited and Chevron Canada Resources (collectively Chevron).

A summary of the comments received during the comment process is provided below:

- BP and SEMI supported the tariff as filed.
- All commenters, with the exception of Chevron, supported the proposed changes in allocation following the TMX Phase 1 expansion (that is, the increase in capacity allocated to Westridge Dock by 2,200 m3/d (13,820 bpd) and the change to the ratio of remaining capacity allocated to Export and Domestic Destinations).
- Five companies (ConocoPhillips, Nexen, Tesoro, Petro-Canada and Chevron) were opposed in whole or in part to the proposed changes in the allocation procedures and were of the view that changes to the allocations and allocation procedures for both Phase 1 and Phase 2 of the TMX expansion should be considered together.
- ConocoPhillips also requested that the timing of review of TMI's allocations be added as an issue.
- CAPP was also of the view that changes for both Phase 1 and Phase 2 should be considered together.
- Astra and CAPP neither supported nor opposed the proposed change in procedures. However:
  - Astra requested clarification of certain of the articles in the tariff; and
  - CAPP noted the lack of unanimous support amongst TMI shippers for the tariff.
- Astra also requested clarification on:
  - what will be the disposition of the Westridge Dock Bid Premium; and
  - when the Premium is payable

With the exception of BP and Tesoro, all commenters supported a written process to consider the application.

- BP did not comment on process.
- Tesoro submitted that the allocation procedures should not be changed and that the allocation of the additional TMX capacity should be addressed through shipper consultation.

In its reply comment, TMI responded to the comments submitted by repeating a number of the points raised its application. It noted that it has not yet made application to determine the allocation of the Phase 2 capacity and recognized that there are options to be discussed with shippers regarding this capacity. It did not feel that approval of its 14 March 2008 application on a final or interim basis should be deferred until the Phase 2 capacity discussions are complete.

Board decision on the process for dealing with the Application

The Board has decided to convene a public hearing, with an oral final argument portion. The oral final argument will commence at 9:00 a.m. Calgary time, 4 September 2008 in the Board's hearing room. The hearing room is located on the second floor of the Board's offices at 444 – 7th Avenue SW, Calgary, Alberta. The Hearing Order setting out the procedures to be followed in this hearing is attached.

The Board has determined that the Phase 1 and Phase 2 capacity allocation procedures should be considered in the same proceeding, particularly given the interrelated subject matter, the timing of Phase 2 capacity coming on stream and the increased efficiencies of dealing with these matters concurrently since the same parties will be involved in both matters. As a result, the List of Issues in Appendix I to the Hearing Order includes both Phase 1 and Phase 2 capacity allocation procedures. The Board expects TMI to file its submissions with respect to Phase 2 capacity allocation procedures at the time it files its additional written evidence, by 11 June 2008.

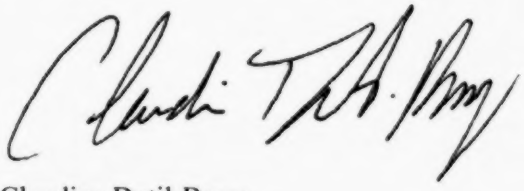
Although Astra requested clarification on the disposition of the Westridge Dock Premium, the Board is of the view that that matter currently falls within the scope of separate toll filings; that is, the toll filings of TMI, Board File OF-Tolls-Group1-T246-2008-01 01. As a result, at this time, it is not necessary to add that issue to the scope of these proceedings. However, the issue of "when the Premium is payable" falls within the scope of the capacity allocation procedures and accordingly, is within the scope of this proceeding.

ConocoPhillips also requested that the issue of TMI's allocations not being reviewed on an annual basis be added to the List of Issues. The Board is of the view that this is appropriately within the scope of this proceeding. A number of other issues raised in the Application and in

the comment process have also been included within the scope of this hearing. Please refer to the List of Issues in Appendix I to the Hearing Order for further information.

The Board directs TMI to serve a copy of this letter and the attached Hearing Order on the persons or agencies listed in Appendix III of the Hearing Order by 28 May 2008.

Yours truly,



Claudine Dutil-Berry
Secretary of the Board

cc: Mr. D. Scott Stoness, VP Regulatory Affairs, Trans Mountain Pipeline Inc.

Attachment

Appendix II

Ruling 2 and Revised List of Issues

File OF-Tolls-Group1-T246-2008-02 01
5 June 2008

To: All Parties to Hearing Order RH-4-2008

Trans Mountain Pipeline Inc. (TMI) application for PROPOSED Tariff No. 74
Hearing Order RH-4-2008
List of Issues and List of Parties
Ruling Number 2

Pursuant to paragraph 5 of Hearing Order RH-4-2008, attached is the List of Parties to the RH-4-2008 proceeding. On receipt of this List of Parties, intervenors are required to serve their written interventions on all other intervenors. Parties are to advise the National Energy Board of any change in their contact information. The List of Parties will be amended for any such changes.

Pursuant to paragraph 7 of the Hearing Order, immediately after receiving this List of Parties TMI must serve a copy of its application and all related documents on each intervenor who has not yet received a copy.

The Board has received submissions from TMI and Astra Energy Canada Inc. (Astra) suggesting additions to the List of Issues.

Specifically, TMI suggested that where the issues refer to "rules and regulations" that a change be made to refer to "tariffs, rules and regulations". TMI further stated that, while the List of Issues in the RH-4-2008 Hearing Order is general enough to encompass the following issues, TMI would be addressing in detail:

1. Allocation of Capacity with respect to receipts and deliveries at Kamloops.
2. Clarity with respect to the definition of Land versus Dock Deliveries.

The Board is of the view that the suggested change to the terminology and adding the above issues to the List of Issues will provide clarification for the Board and all Parties, and will further assist the Board in reaching its decision on this application. The Board accepts the change requested by TMI and will add TMI's additional detailed issues to the RH-4-2008 List of Issues.

Astra requested the addition of the following issue:

> What should be the appropriate disposition basis for 2008 and beyond dock premiums collected?

With respect to Astra's request, the Board stated on page 3 of its 26 May 2008 letter enclosing the RH-4-2008 Hearing Order that the disposition of the Westridge Dock Premium currently falls within the scope of separate toll filings and that it is not necessary to add that issue to the scope of these proceedings at this time. Astra has provided no additional justification that would persuade the Board to change this decision. The Board therefore, denies Astra's request.

The List of Parties and a revised List of Issues, with the revisions to the existing Issues and the two new issues, are attached.

Yours truly,

AnneMarie Erickson

for
Claudine Dutil-Berry
Secretary of the Board

Attachments

RH-4-2008
REVISED LIST OF ISSUES

The Board has identified but does not limit itself to the following issues for discussion in the proceeding:

1. **Allocation of capacity with respect to receipts and deliveries at Kamloops.**

2. The appropriate capacity to be allocated for deliveries over the Westridge Dock.

3. The appropriate **tariff**, rules and regulations governing nominations and the allocation of capacity for deliveries over the Westridge Dock, including whether there should be a limit on the types of crude oil that can be accepted for delivery over the Dock and if so, under what circumstances, and the basis for when the Westridge Dock bid premium is payable.

4. **Clarification of the definition of Land versus Dock Deliveries.**

5. The appropriate **tariff**, rules and regulations governing nominations and the allocation of capacity for deliveries to land-based destinations, including whether the confidential export agreement for deliveries to Export Destinations should be continued and whether Export and Domestic Destinations categories should be combined into a single category.

6. Whether there should be a regular review by TMI and its shippers of capacity allocations to the various destinations on the Trans Mountain pipeline system; and if so, the appropriate schedule for such review.

7. Whether the proposed allocation procedures to accommodate Phase 1 and Phase 2 of the Anchor Loop TMX expansion are consistent with the National Energy Board Act, notably the common carrier and no unjust discrimination provisions.